



DEPARTMENT OF DEFENSE  
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***SOCO Advisory***



**To: Designated Agency Ethics Officials  
Deputy Designated Agency Ethics Officials  
Ethics Counselors**

**Number 97-01**

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**Special Edition--Procurement Integrity Regulations**

The regulations are out! They were published in the Federal Register on January 2, 1997, 61 Fed. Reg. 226-233, and are effective as of January 1, 1997. A summary is provided below.

**APPLICABILITY.**

The restrictions on disclosing and obtaining procurement information apply on 1/1/97 to all Federal agency competitive procurement using appropriated funds. The requirements regarding contacts for non-Federal employment apply on 1/1/97 to all Federal agency competitive procurement if expected to exceed the simplified acquisition threshold. Those requirements cease after award or cancellation of the procurement.

The post-employment restrictions apply to all former officials for services or decisions made on competitive or non-competitive contracts on or after 1/1/97. For former officials who retired prior to 1/1/97, the restrictions as they applied prior to 1/1/97 have been continued through 12/31/98. If an employee retired on 12/31/96, he or she is subject only to the restrictions of the old regulation. If that employee would have been subject to the old restrictions and did nothing to trigger the new restrictions, but retired on 1/3/97, he or she is not subject to any procurement integrity restrictions. If, however, that same employee performed one of the acts that trigger the new restrictions, he or she is subject only to the restrictions of the new regulation. (Clear?????)

**SEEKING EMPLOYMENT.**

An employee who is "participating personally and substantially in a Federal agency procurement" in excess of the simplified acquisition threshold and who "contacts or is contacted by" a bidder or offeror in that procurement regarding possible non-Federal employment **MUST**:



- 1) promptly report the contact in writing to his supervisor and agency ethics official and,
- 2) either:
  - a) unequivocally reject the possibility of employment or
  - b) disqualify himself from "personal and substantial participation" in the procurement.

"Personal" and "substantial" are almost verbatim definitions from 5 C.F.R. § 2635.402(b)(4). "Participating personally and substantially in a Federal agency procurement" means "active and significant involvement" in any of the following activities directly related to the procurement:

- drafting, reviewing or approving the specification or statement of work;
- preparing or developing the solicitation;
- evaluating bids or proposals;
- selecting a source;
- negotiating price or terms and conditions; or
- reviewing and approving the award.

Sound familiar? Except for preparing procurement or purchase requests, it is virtually identical to the old "procurement function." Reviews solely to determine compliance with regulatory, administrative, or budgetary procedures are not substantial participation. There are also four exclusions: certain agency level boards, panels or advisory committees; general technical, engineering or scientific effort with broad application; clerical functions; and A-76 management studies and other activities.

The current "simplified acquisition threshold" is \$100,000.

Contacts through agents may trigger the requirement to disqualify. Check 18 U.S.C. §208 and 5 C.F.R. § 2635.603(c).

The employee accomplishes disqualification by submitting a written notice to the head of the contracting activity (HCA), with copies to the contracting officer, source selection authority, and the immediate supervisor. We recommend that your instructions also include the agency ethics official.

The HCA has the discretion to authorize resumed participation, including after an additional period, in accordance with the waiver provisions of 18 U.S.C. § 208 if the contacts have elevated to employment discussions or the regulations at 5 C.F.R. § 2635.502(d) for contacts constituting seeking employment under §2635.603(b)(1)(ii) or (iii). In addition, the HCA may authorize participation only when one of two conditions have been met: the person is no longer a bidder or offeror; or all discussions have terminated without an agreement. The HCA must consider all factors that might give rise to an appearance that the official acted without complete impartiality and must consult with the ethics official.

Although the regulation states that a decision to resume participation *should* be in writing, we highly recommend that it *always* be in writing. The HCA may decide not to authorize the participation. [Note: Authority to issue 18 U.S.C. § 208 waivers must be delegated to the HCA before these decisions may be made. See also JER § 5-302.]

If the disqualification interferes substantially with the employee's ability to perform assigned duties, the agency may take appropriate action under 5 C.F.R. § 2535.604(d).

## **POST-EMPLOYMENT.**

Certain former employees may not accept compensation from certain contractors for a period of 1 year following certain service(s):

1. Procuring contracting officers, source selection authorities, members of source selection evaluation boards, and chiefs of financial or technical evaluation teams may not accept compensation from contractors selected for awards of those contracts in excess of \$10,000,000 for 1 year from the following:

Date of selection of that contractor if they served on the date of selection, but not the date of award; or

Date of award of the contract if they served on the date of award.

2. Program managers, deputy program managers and administrative contracting officers for contracts in excess of \$10,000,000 may not accept compensation from that contractor for 1 year from the last date of service in those positions.

3. Officials who personally made decisions

- a. to award contracts, subcontracts, or modifications of contracts or subcontracts, or task or delivery orders in excess of \$10,000,000, or
- b. to establish overhead or other rates valued in excess of \$10,000,000, or
- c. to approve issuance of a contract payment in excess of \$10,000,000, or
- d. to pay or settle a claim in excess of \$10,000,000

may not accept compensation from the affected contractor for 1 year from the date of decision.

Many terms, including "In excess of \$10,000,000" for various types of contracts, "compensation", "decision to award a subcontract" and "source selection evaluation board" are defined at section 3.104-3 of the regulation. The definition of Program Manager and Deputy Program Manager will be published as part of a Defense Acquisition Circular and will use the DAWIA definitions from 10 U.S.C. § 1737(a). Program Manager is the "member of an Acquisition Corps responsible for managing the program, regardless of the title given."

These officials may accept compensation from any division or affiliate of the contractor that does not produce the same or similar products or services.

Officials and former officials may make signed, written, and dated requests for advice

from agency ethics officials *prior* to accepting compensation. The information to be included in the request is in the regulation. The ethics official will issue a written opinion within 30 days after complete information is received and may rely on that information, unless there is reason to believe that the information is fraudulent, misleading, or otherwise incorrect. The requestor and contractor may make good faith reliance on that written opinion.

#### **OTHER PROVISIONS.**

Procurement integrity certifications were eliminated.

Reminder: Other post-Government employment statutes, such as 18 U.S.C. § 207 also apply.

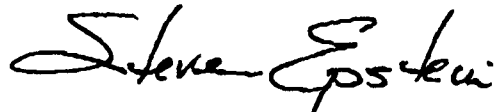
#### **INFORMATION.**

With respect to Federal agency procurement, any present or former official, anyone who is acting or has acted on behalf of the U.S., or anyone who is advising or has advised the U.S. and who has access to contractor bidder or proposal information or source selection information shall not knowingly disclose that information before award, except as provided by law.

Any person shall not knowingly obtain contractor bidder or proposal information or source selection information before award, except as provided by law.

"Contractor bid or proposal information" and "source selection information" are defined in the regulation

If you have questions, contact your ethics official or Gail D. Mason of DoD SOCO at (703) 697-5305.



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